(4)

No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court properly granted summary judgment against a claim of false arrest for shoplifting where it is undisputed that the arresting officers made the arrest after a private supermarket security guard signed a complaint and stated to the officers that he had personally witnessed the theft and had seen the plaintiff, when accosted, run back into the store and throw the stolen items onto the floor.

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ARGUMENT

This case is straightforward. It concerns a garden-variety probable cause determination and raises no novel issue of law. The appellate court, in the course of its decision, discussed at length the circumstances in which police may properly arrest persons suspected of crimes. Petitioner has seized upon fragments of that discussion in an attempt

to persuade this Court that the Seventh Circuit created a new standard for probable cause in this case and that grave conflicts exist between this decision and those of other courts and of this Court. In fact, no such conflicts exist, and this case does not merit Supreme Court review.

A.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE FACTUAL RECORD WHERE THE DISPOSITIVE FACTS ARE UNDISPUTED AND THE CORRECT SUMMARY JUDGMENT STANDARD WAS APPLIED BELOW.

As a threshold matter, it is necessary to dispose of the petitioner's argument that summary judgment was improperly granted in this case because the Seventh Circuit read the record incorrectly. That is simply not a sufficient basis for review by this Court. In any case, the appellate court read the record carefully and applied the correct standard for summary judgment. Moreover, there is no need for this Court to grant certiorari to make an independent review of the entire factual history of this case because only a small number of material facts are dispositive of this case, and those facts are uncontradicted.

Petitioner has made a wealth of factual assertions in his petition for certiorari. However, the existence of a factual dispute over Gramenos' innocence, no matter how sharp the controversy, does not necessarily preclude summary judgment in this case. Rather, the dispute must be over ultimate facts *material* to the case. *United States v. Diebold*, 369 U.S. 654, 655 (1962). As this Court has recently emphasized in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. ____, 91 L.Ed.2d 202 (1986), a material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth.

Unquestionably, on the record in this case, there are many disputed issues of fact. But the Seventh Circuit, applying the standard set forth by this Court last year in *Anderson* and *Celotex Corp. v. Catrett*, 477 U.S. ____, 91 L.Ed.2d 265 (1986), found that none of these disputed facts was material. After careful review of the record, the Seventh Circuit found that the key facts were not in dispute:

> We therefore take only the facts on which there is no genuine dispute. Vaughn, a store guard, told the police that he saw Gramenos put items in his pocket and try to leave the store with them, and that Gramenos ran wildly through the aisles scattering food after being confronted. Vaughn filled out a criminal complaint and signed it in the presence of the two officers. Gramenos denied everything (except walking quickly through the aisles). The police interviewed no one else and took Gramenos away. Did they have probable cause? *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 438 (7th Cir. 1986).

(See also R. 81, Exhibits 1-4).

The matters of fact which Gramenos makes much of in his petition for certiorari are not material because they are not probative of any controlling issue. For instance, plaintiff makes the assertion that the "arresting officers refused to interview available witnesses" even though substantial evidence exists to the contrary in the statements made by two shoppers in their depositions (R. 81, Exhibit 7, Deposition of Nanci Halling, pp. 15-34; Exhibit 8, Deposition of Juan Beard, pp. 12-13). Most of the petitioner's remaining assertions are simply his side of the story of what happened on the night in question. There is a classic credibility contest here, and petitioner's factual contentions as to his innocence were certainly highly relevant and material to the ultimate determination of

truth in the criminal trial he received on the charge of shoplifting. However, for purposes of false arrest, the issue is whether the police had probable cause to arrest based on what they knew at the time, not whether the individual arrested was ultimately guilty or innocent.

Police are not required to ignore circumstances that support a finding of probable cause to arrest simply because a suspect denies the charge. Unraveling the truth of the claims is not a task for the police, but one for the trier of fact in a criminal proceeding. The only decision the police make is whether there is enough evidence that a crime has been committed, and that the individual before them is connected to that crime. If so, they should arrest the individual so that he enters into the criminal justice system and so that an eventual determination of his guilt or innocence can be made by a judge or jury.

The burden rests upon petitioner, as the party opposing summary judgment, to set forth specific facts showing a genuine issue for trial on the material facts of the case; petitioner cannot rely upon mere allegations or denials. *Celotex*, 91 L.Ed.2d at 265. Petitioner has not set forth any material, disputed facts. The court properly granted defendants' motion for summary judgment, finding, as a matter of law, that the police had probable cause to arrest.

There is no reason to grant certiorari here in order to review the entire factual record since the dispositive facts are uncontested and the summary judgment standard was correctly applied.

B.

NO CONFLICT EXISTS BETWEEN THE OPINION BELOW AND THE SETTLED LAW OF THIS COURT OR OTHER COURTS.

Petitioner's principal assertion is that the Seventh Circuit's opinion in this case conflicts with the settled law of this Court, the appellate circuits, and the Illinois Supreme Court. Contrary to petitioner's assertion, the case at bar neither sets a new standard for probable cause nor creates any novel exception to the reliable informer rule. This case is not in conflict with long-established precedent on probable cause; rather, it takes that law and applies it correctly to the particular facts of this case.

The holding of this case is that no false arrest charge may be sustained against arresting officers when an eyewitness private guard (1) states to the officers that he saw the shoplifting take place and saw the shoplifter run back into the store throwing the stolen items on the floor, and (2) personally signs a complaint against the individual. Such a holding is consistent with the facts and breaks no new ground.

It is true that in the court's wide-ranging discussion of probable cause there is a passing reference to the view that the Supreme Court in the *Gates* decision set forth a "lower standard of probable cause."[1] That statement,

[1] The court's actual statement was: "Some parallel rules suggest that one reliable eyewitness is enough. Even before *Gates*, a single tipster could supply probable cause to issue a search or arrest warrant, if the police had reason to think that the informant had firsthand knowledge and was reliable. *See Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); both overruled (in favor of a lower standard of probable cause) by *Gates*. The opin-

(Footnote continued on following page)

however, was dictum and did not form the basis of the decision in this case. The decision, instead, was based on standard probable cause analysis and was a correct application of that analysis to the facts of the case.

The Decision Below Is Consistent With The Standard Set In *Gates*

The standard for probable cause employed in the instant case was the standard set down by this Court in *Illinois v. Gates*, 462 U.S. 213, 230 (1983). As this Court said in *Gates*, probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts. *Gates*, 462 U.S. at 232. Applied to evaluating informants' tips, this standard recognizes that such tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One rigid legal rule will not cover every situation. *Gates*, 462 U.S. at 232.

An informant's "veracity," "reliability," and basis of knowledge are all highly relevant in determining the value of his report. These elements are not entirely separate and independent requirements to be mechanically applied in every case. Rather, they are closely intertwined issues that may usefully illuminate the common sense, practical question of whether there is probable cause. *Gates*, 462 U.S. at 230. This "totality-of-the-circumstances" approach is intended, this Court has said, to be a "practical, non-

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[1] *continued*
ions in *Aguilar* and *Spinelli* take it as a point of departure that the report of one identified, reliable eyewitness creates probable cause. The Court has never suggested that the police, with such information in hand, must conduct a further investigation or put contradictory evidence into the affidavit." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 440 (7th Cir. 1986).

technical conception." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

Consistent with *Gates*, the Seventh Circuit correctly concluded that the police made a reasonable decision to arrest in light of all the circumstances they found. The arresting officers arrived to find a private informant, specially trained to look for shoplifting by virtue of his job as a security guard in a supermarket. That informant stated to them that he personally witnessed commission of the crime and that after he accosted the suspect that suspect ran back into the store. The guard personally signed the complaint.

This store guard was not a paid professional informant, nor was he making an anonymous tip. Instead, the court properly concluded that the police were entitled to treat him like any other citizen informant and to find him reliable. The guard had been hired for the special task of watching closely for shoplifting. And, as the court noted in its decision, Jewel has an interest in wishing to avoid costly tort litigation and angering honest customers. Thus, it is unlikely to tolerate having its guards make unsubstantiated charges, and so its guards are likely to err on the side of caution. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 439 (7th Cir. 1986). In such a context, the court held, the police were entitled to give the guard's eyewitness testimony at least as much credence as they do reports by private citizen complainants. As this Court has said of such citizen informants in *Gates*, 462 U.S. 213, 233-34:

> Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his

> knowledge unnecessary. *Adams v. Williams*, [407 U.S. 143, 147 (1972)]. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.

The guard was not saying anything inherently incredible; there was no *a priori* reason not to believe him. If Vaughn saw what he said he saw, then the petitioner was the guilty man. The fact that the suspect was an attorney does not change the outcome.

Petitioner argues that the decision at bar could not have applied the "totality of the circumstances" standard set forth in *Gates* because the court never used those precise words. But the rationale of the court shows that the correct standard was used and the court cannot be held in error simply because it did not use the phrase as a talisman. The court in *Gramenos* reviewed all the information known to the officers and the source from which it came. The analysis employed in this case is consistent not only with the standard for probable cause set out recently in *Gates*, but in this Court's earlier decisions as well. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). Given the facts of this case, the outcome reached is entirely proper. No conflict is created, and no review is merited.

No Conflict Exists Between The Opinion Below And Seventh Circuit Decisions

Petitioner further argues that the decision at bar is in conflict with prior decisions of the Seventh Circuit. This argument is meritless for several reasons. To begin with, a conflict between decisions rendered by different panels

of the same court of appeals is ordinarily not a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974). Further, the appellate panel in this case clearly did not believe that their opinion created any conflicts; they denied petitioner's request to rehear the case. Nor did the appellate court as a whole perceive any conflicts, since it denied petitioner's suggestion of rehearing *en banc*.

Moreover, examination of the body of Seventh Circuit law on this question reveals no inconsistencies. Petitioner cites to four Seventh Circuit cases as allegedly in conflict with the decision in *Gramenos*. In fact, in all four of the cases, as in *Gramenos*, the court based its determination of probable cause on whether, in view of all the circumstances, there was a minimum level of reliable information establishing that a crime had taken place and that the suspect was connected with it.

In *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323 (7th Cir. 1978), the first of the Seventh Circuit cases cited by petitioner, an undercover agent for Goldblatt's security department reported to his superiors that he had heard that six store employees were plotting a murder. The murder was allegedly planned for a store security officer scheduled to testify against a former employee fired for stealing store goods. The Seventh Circuit held that the police lacked probable cause to arrest the six employees allegedly involved in the plot. The court based its holding on the fact that the informant had no first-hand information himself, signed no complaint, and the store gave the police no direction to arrest. Additionally, the police did not know the informant who was supplying the information, had no prior experience with him, and had not themselves witnessed any threats. Such a factual situation, where it is not even clear whether a crime occurred at all and

whether there is anything to link the defendants to such a crime, is clearly distinguishable from the case at bar, and represents merely a different result mandated by different facts. The analysis is not in conflict with that employed in *Gramenos*.

Second, petitioner cites to *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985) as a case also allegedly in conflict with the case at bar; again, no real inconsistency exists. The plaintiffs in the *Moore* case were individuals who had left a restaurant without paying because of a dispute over service and were arrested in their camper homes at night. The Seventh Circuit explicitly applied the standard set out in *Beck v. Ohio*, 379 U.S. 89, 91 (1964), that the validity of the arrest depends upon whether "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." The appellate court, in three separate opinions, applied that test to the facts in *Moore* and held that summary judgment should not have been granted on the issue of probable cause.

Writing for the court, Judge Coffey stated that material issues of fact remained to be decided, such as whether the plaintiffs had been present at the restaurant at all, or if their statements that they had been there had been coerced by the night-time entry of the police into their home. *Moore*, 754 F.2d at 1347. Judge Posner agreed, finding that if the entry was without consent the police did not have the right to enter the campers in the middle of the night on a misdemeanor charge, and that the statements by the individuals were coerced and could not form a link between them and a crime. *Moore*, 754 F.2d at

1358. Judge Gibson, in the third separate opinion, concurred that the case must be remanded for a jury trial because there was no warrant and no signed complaint.

In sum, all three members of the panel found that, given the facts of the *Moore* case—an arrest far from the scene of the "crime", in a camper home at night, with no information to link the plaintiffs to the restaurant or any offense other than the suspects' own coerced statements, with no signed citizen complaint filed against the individual—no probable cause existed. Those facts are entirely distinguishable from the facts of the instant case, and there is nothing inconsistent in the two results.

Third, petitioner relies on the recent Seventh Circuit case of *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986). In fact, that case shows precisely the continuity of Seventh Circuit opinions on the issue of probable cause. The court summed up in *BeVier* the teaching of the *Gramenos* case: "There is no general duty to investigate further *after* acquiring information sufficient to establish probable cause." (*BeVier*, 806 F.2d at 127, n.1) (emphasis added). As the court summarized *Gramenos*, where there is a credibility contest between the plaintiff and a store security guard, and where the police have reliable information from the statements of the eyewitness and his signed complaint, probable cause exists. *BeVier*, 806 F.2d at 127, n.1.

The *BeVier* court found that the key to whether there is probable cause is whether the police have sufficient information to make a reasonable decision. In *BeVier*, the information was insufficient to the point where it was "unclear whether a crime had even taken place." *BeVier*, 806 F.2d at 128. In that case a state police officer had arrested parents for child abuse and neglect without ever getting information from *anyone*—babysitter, parents,

third-parties—to establish that the parents had in fact knowingly and wilfully abused their children. As the court summed up, more investigation was needed in such a situation before probable cause could be established. *BeVier*, 806 F.2d at 127. In contrast, in the instant case there was sufficient information provided to the police from the eyewitness statement and signed complaint of the guard to have cause to arrest petitioner. In such circumstances, "an officer who had established cause on every element of the crime need not continue investigating to check out leads or test the suspect's claim of innocence." *BeVier*, 806 F.2d at 128.

The final case cited by petitioner as being in conflict with the decision at bar is *Llaguno v. Mingey*, 736 F.2d 1560 (7th Cir. 1985). The *Llaguno* case first of all concerns vastly different circumstances: an emergency search of a private home in the wake of the shooting of seven people. The court naturally took into account the gravity of the crime and the threat of its imminent repetition in assessing the amount of information that prudent police must collect before deciding to make a search or arrest. *Llaguno*, 763 F.2d at 1565-6. The court applied the test of *Beck v. Ohio*, 379 U.S. 89, 91 (1964), that probable cause means a reasonable basis—"more than bare suspicion, but less than virtual certainty"—and concluded that given the serious situation in the case, the police had probable cause to enter the house. Clearly, the *Llaguno* case presents no conflict with the decision in *Gramenos*.

In sum, the present case is not in conflict with other Seventh Circuit opinions and for that reason does not merit review.

No Conflict Exists Between This Decision And Decisions Of Other Circuits

Petitioner also argues that the decision in the instant case creates conflicts with the decisions of the Fifth, Eighth, and Tenth Circuits. However, there is no conflict between the standard of probable cause used in those circuits and that employed in this case.

The two Fifth Circuit opinions, *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir. 1975) and *Duriso v. K-Mart No. 4195, Div. of S.S. Kresge Co.*, 559 F.2d 1274 (5th Cir. 1977) both focused not on probable cause, but on whether private stores were state actors. In neither case were the police even named as defendants. Additionally, both cases concerned circumstances in which there was either no written complaint signed by a store employee or where the matter was in doubt. Again in both cases the available information establishing that a crime had even taken place was very weak: the plaintiff shopper was either not personally observed committing a crime, or the individual had not even passed through the counter area before being detained. All in all, these two Fifth Circuit cases involve vastly different fact situations than in our case and the analysis employed is not inconsistent with that employed by the Seventh Circuit below.

As for the case petitioner cites from the Eighth Circuit, *El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980), or the case cited from the Tenth Circuit, *Lusby v. T. G. & Y. Store, Inc.*, 796 F.2d 1307 (10th Cir. 1986), both involved outrageous conduct by store employees and police. Because of the issues of excessive force and state action raised in those cases, there was little focus on the issue critical to the instant case—when police have probable cause to arrest. In addition, in *Lusby*, unlike in the case

at bar, no eyewitness information linked the shopper to any crime. No conflict can be said to exist between any of the cases cited by petitioner so as to impel review.

No Conflict Exists Between The Opinion Below And Decisions Of The Illinois Courts

Finally, petitioner argues that the decision of the Seventh Circuit in the case at bar conflicts with settled Illinois law. In particular, petitioner cites to *People v. Tisler*, 103 Ill.2d 226, 469 N.E.2d 147 (1984) as an Illinois Supreme Court case that cannot be reconciled with *Gramenos*. That case does not provide a basis for review for two reasons: (1) there is no conflict between *Tisler* and *Gramenos*; and (2) the factual circumstances of *Tisler* make it largely inapposite.

The focus in *Tisler* was the Illinois state constitutional standard for probable cause. *Tisler* was one of the first Illinois cases decided after this Court's ruling in *Gates*, and in *Tisler* the Illinois Supreme Court explicitly adopted the *Gates* standard for resolving probable cause questions involving an informant's tip under the Illinois Constitution. Therefore, the court in *Tisler* applied the same "totality of the circumstances" standard as was used in the case at bar.

As to the holding of the *Tisler* case, even though the court held that the police had probable cause to arrest, the factual circumstances were quite different from the case at bar and are not helpful to the discussion here. *Tisler* involved a telephone call from an informant who had tipped off the police twice before and this time reported that an individual would be delivering LSD at a certain time and place. Events took place as predicted in the tip, and the defendant was arrested and charged

with possession. *Tisler*, 103 Ill.2d 226, 469 N.E.2d at 150-52. Applying *Gates*, the Illinois Supreme Court concluded that since the informant in *Tisler* had proven to be trustworthy and his tip had been confirmed in virtually every detail prior to arrest, probable cause existed. *Tisler*, 103 Ill.2d 226, 469 N.E.2d 158-160.

It is very difficult to find any aspect of the *Tisler* decision that puts it in conflict with *Gramenos*. The focus of the two cases is simply not the same. The informant in *Tisler* was neither a victim nor an ordinary citizen, but was instead an individual who regularly made tips to the police about criminal activity. Such an informant is akin to a professional or anonymous informant, for whom special reliability guarantees are required, and has little in common with the security guard in the *Gramenos* case who, while specially trained to look for evidence of the crime of shoplifting, is not otherwise like a police informant. There is no conflict here which merits review.

No Basis For Review Exists

In sum, petitioner's arguments for granting certiorari are without merit. Petitioner received careful consideration of the factual record and an application of the correct summary judgment standard. The court made a thorough examination and concluded that while the defendants' motion for summary judgment should be granted on the issue of probable cause, it should be denied on the issue of detention. The detention aspect of the case is now on remand to the district court.

Petitioner's case has been treated with precision and thoroughness, with the Seventh Circuit applying this Court's lessons to the facts before it. No basis for review exists.

CONCLUSION

For all the reasons listed above, respondents JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY respectfully request that this Court deny the Writ of Certiorari.

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